

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLEANAIRNOW, et al.,

Plaintiffs,

v.

LOUIS DEJOY, et al.,

Defendants,

OSHKOSH DEFENSE, LLC,

Intervenor-Defendant

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE, et al.,

Defendants,

OSHKOSH DEFENSE, LLC,

Intervenor-Defendant.

Case Nos. 3:22-cv-02583- RFL
3:22-cv-02576-RFL

~~[PROPOSED]~~ STIPULATED
PROTECTIVE ORDER

Honorable Rita F. Lin

Subject to the Court’s approval, Plaintiffs in the above-captioned cases (Plaintiffs), Defendants Louis DeJoy and the U.S. Postal Service (Defendants or Postal Service), and Intervenor-Defendant Oshkosh Defense, LLC, (Oshkosh)—collectively, the Parties—enter this Stipulated Protective Order (Order). The Order is based on the Northern District of California’s model protective order for standard litigation. A redline comparison of this Order and the model order (Exhibit A) tracks deviations that account for the requirements of administrative record review.

1. PURPOSES AND LIMITATIONS

The administrative record for the Postal Service’s revised record of decision for the Next Generation Delivery Vehicle Acquisitions program may contain confidential, proprietary, or private information for which protection from public disclosure or use for any purpose other than this litigation may be warranted. To expedite production of the administrative record, the Parties agree to this Order that permits the Postal Service to serve on the Parties, subject to the protections herein, portions of the administrative record containing sensitive information pertaining to the Postal Service’s and Oshkosh’s operations and other confidential research, development, or similar information.

Unrestricted disclosure of such information may create a substantial risk of harm to the Postal Service. Further, unrestricted disclosure of such information could pose a substantial risk of serious competitive harm to other entities (such as Oshkosh) whose sensitive, confidential, or proprietary information may be included in the administrative record.

Under the Court’s scheduling order (*California* Dkt. 146), the administrative record will not be filed with the Court. Rather, the Postal Service will serve the administrative record on the Parties. The Postal Service generally will include in the administrative record two versions of each document that contains sensitive information: (i) a redacted version that does not require protection; and (ii) an unredacted version that contains confidential information subject to this Order. The administrative record also may include a small number of engineering and other highly sensitive commercial documents that contain trade secrets and thus require full redaction. *See* 39 U.S.C. § 410(c)(2). For those documents, the Postal Service will produce one unredacted version subject to this Order.

At the conclusion of summary judgment briefing, Plaintiffs will file a joint appendix containing copies of the portions of the administrative record relied upon in the Parties' summary judgment briefs.

Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party that designates information or items that it produces in the administrative record as "CONFIDENTIAL."

2.5 Administrative Record Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated as part of the administrative record in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant

1 in this action.

2 2.7 House Counsel: attorneys who are employees of a party to this action. House Counsel
3 does not include Outside Counsel of Record or any other outside counsel.

4 2.8 Non-Party: any natural person, partnership, corporation, association, or other legal
5 entity not named as a Party to this action.

6 2.9 Outside Counsel of Record: attorneys who are not employees of a party to this action
7 but are retained to represent or advise a party to this action and have appeared in this action on behalf
8 of that party or are affiliated with a law firm which has appeared on behalf of that party.

9 2.10 Party: any party to this action, including all of its officers, directors, employees,
10 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

11 2.11 Producing Party: a Party that produces Administrative Record Material in this action.

12 2.12 Professional Vendors: persons or entities that provide litigation support services (e.g.,
13 photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing,
14 or retrieving data in any form or medium) and their employees and subcontractors.

15 2.13 Protected Material: any Administrative Record Material that is designated as
16 "CONFIDENTIAL."

17 2.14 Receiving Party: a Party that receives Administrative Record Material from a
18 Producing Party.

19 3. SCOPE

20 The protections conferred by this Stipulation and Order cover not only Protected Material (as
21 defined above), but also (1) any information copied or extracted from Protected Material; (2) all
22 copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
23 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.
24 However, the protections conferred by this Stipulation and Order do not cover the following
25 information: (a) any information that is in the public domain at the time of disclosure to a Receiving
26 Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of
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publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. This Stipulation and Order is without prejudice to the right of any party to seek modifications of this Stipulation and Order in any way.

Nothing in this Stipulation and Order shall be construed to affect the responsibility of the Defendants to comply with any applicable law or regulation or to otherwise limit the authority or discretion of the Postal Service to undertake any action pursuant to any applicable law or regulation. Defendants' disclosure of documents, information, material, or items pursuant to this Stipulation and Order shall not be deemed a public disclosure under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*

4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law. After the final disposition of this action, the Parties shall destroy or return to the Postal Service all Protected Material, including all copies thereof, provided that counsel of record for each party may maintain a copy of any briefs, pleadings, or other material filed with or presented to the Court in this action.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. The Designating Party

1 must designate for protection only those parts of material, documents, items, or oral or written
 2 communications that qualify - so that other portions of the material, documents, items, or
 3 communications for which protection is not warranted are not swept unjustifiably within the ambit of
 4 this Order.

5 Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown
 6 to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily
 7 encumber or retard the case development process or to impose unnecessary expenses and burdens on
 8 other parties) expose the Designating Party to sanctions.

9 If it comes to a Designating Party's attention that information or items that it designated for
 10 protection do not qualify for protection, that Designating Party must promptly notify all other Parties
 11 that it is withdrawing the mistaken designation.

12 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see,
 13 e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Administrative
 14 Record Material that qualifies for protection under this Order must be clearly so designated before the
 15 material is disclosed or produced.

16 Designation in conformity with this Order requires:

17 (a) For information in documentary form (e.g., paper or electronic documents, but
 18 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party
 19 affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion
 20 or portions of the material on a page qualifies for protection, the Producing Party also must clearly
 21 identify the protected portion(s) (e.g., by making appropriate markings in the margins).

22 (b) A Party that makes original documents or materials available for inspection need not
 23 designate them for protection until after the inspecting Party has indicated which material it would
 24 like copied and produced. During the inspection and before the designation, all of the material made
 25 available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified
 26 the documents it wants copied and produced, the Producing Party must determine which documents,
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or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the “CONFIDENTIAL” legend to each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time until 60 days after the final disposition of this litigation. Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed. The following process shall be the exclusive manner of challenging a designation of Protected Material.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite

1 that the challenge to confidentiality is being made in accordance with this specific paragraph of the
2 Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the
3 process by conferring directly (in voice to voice dialogue; other forms of communication are not
4 sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must
5 explain the basis for its belief that the confidentiality designation was not proper and must give the
6 Designating Party an opportunity to review the designated material, to reconsider the circumstances,
7 and, if no change in designation is offered, to explain the basis for the chosen designation. A
8 Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this
9 meet and confer process first or establishes that the Designating Party is unwilling to participate in the
10 meet and confer process in a timely manner.

11 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
12 intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil
13 Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the initial
14 notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not
15 resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent
16 declaration affirming that the movant has complied with the meet and confer requirements imposed in
17 the preceding paragraph. Failure by the Designating Party to make such a motion including the
18 required declaration within 21 days (or 14 days, if applicable) shall automatically waive the
19 confidentiality designation for each challenged designation. In addition, the Challenging Party may
20 file a motion challenging a confidentiality designation at any time if there is good cause for doing so,
21 including a challenge to the designation of a deposition transcript or any portions thereof. Any motion
22 brought pursuant to this provision must be accompanied by a competent declaration affirming that the
23 movant has complied with the meet and confer requirements imposed by the preceding paragraph.

24 The burden of persuasion in any such challenge proceeding shall be on the Designating Party.
25 Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary
26 expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the
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Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the court rules on the challenge.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgement and Agreement to Be Bound" (Exhibit A);

1 (d) the court and its personnel; and

2 (e) court reporters and their staff to whom disclosure is reasonably necessary for this
3 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A).

4 7.3 Public Records Access and Retention. Nothing contained in this Order shall alter or
5 limit any Receiving Party’s obligations imposed by the provisions of any public records access law,
6 or similar state or local law, regarding the maintenance and disclosure of documents supplied to that
7 Receiving Party. In the event that a Receiving Party receives a request for disclosure that
8 encompasses a document marked by the Designating Party as “Confidential” or “Confidential
9 Business Information” from any person purporting to invoke one or more such public records access
10 laws, or any other law, and a Receiving Party decides that disclosure of such document is required
11 by law, the following provisions shall apply:

12 (a) The Receiving Party shall not make such disclosure without first giving the Designating
13 Party written notice (together with a copy of such person’s request for such documents unless
14 precluded by law). Such notice shall be provided at least ten business days in advance of such
15 disclosure, unless the applicable law requires a disclosure in fewer than ten business days, in which
16 case the applicable Receiving Party agrees to notify the Designating Party of the request through its
17 counsel by telephone and electronic mail as soon as possible and prior to any such disclosure. Unless
18 the Designating Party obtains a court order providing otherwise, the Receiving Party will make any
19 disclosure the Receiving Party determines is required under law.

20 (b) If any legal action is filed against a Receiving Party by any person seeking to compel
21 disclosure of a document marked or designated by the Designating Party as “Confidential” or
22 “Confidential Business Information,” the applicable Receiving Party shall give the Designating Party
23 prompt notice of that legal action and shall not disclose such documents until all judicial proceedings
24 have concluded, unless (i) the court rules otherwise, or (ii) the Designating Party fails to file a motion
25 to intervene within ten business days of such notice. In addition, the parties may resolve any disclosure
26 issue by consent.

(c) In any proceeding to bar or seek the release of “Confidential” or “Confidential Business Information,” the Designating Party shall at all times have the affirmative obligation to intervene, to institute, or to otherwise participate and to defend and substantiate the claim of confidentiality.

(d) In any proceeding under Paragraph 7.3, nothing contained herein shall be construed to prejudice the position of the Designating Party that the disclosure would violate such rights, if any, as the Designating Party would otherwise have under applicable federal, state or local law. The Designating Party reserves the right to seek all relief available to it under applicable federal, state or local law to prevent such disclosure, including such right, if any, as the Designating Party would have had to seek a protective order.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” before a determination by the court from which the subpoena or order was issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should

be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. RESERVED.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives

any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5 is denied by the court, then the Receiving Party may file the information in the public record pursuant to Civil Local Rule 79-5 unless otherwise instructed by the court.

13. FINAL DISPOSITION

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, and hearing transcripts, legal memoranda, correspondence, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective

1 Order as set forth in Section 4 (DURATION).

2 Notwithstanding the foregoing, to the extent that a Receiving Party is a state or local
3 government or agency thereof and has a law, regulation, or policy requiring the retention of
4 documents procured in this litigation, these documents may be retained pursuant to such law,
5 regulation, or policy for only the amount of time permitted by that law, regulation, or policy, and
6 under the maximum protection afforded by that law, regulation, or policy, at which time the
7 documents would be returned to the Designating Party or destroyed in accordance with the laws and
8 procedures then in effect. The obligations of confidentiality imposed by this Order shall survive the
9 cessation of the applicable Receiving Party's need for the documents, and shall continue to apply to
10 the Designating Party and any other persons designated in this Order.

11 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.
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1 Dated: February 16, 2024

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: February 21, 2024



United States District Judge
RITA F. LIN

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on _____ [date] in the cases of *CleanAirNow v. DeJoy*, No. 3:22-cv-02576-RFL and *State of California v. United States Postal Service*, No. 3:22-cv-02583-RFL. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

United States District Court
Northern District of California

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

I hereby certify that the above counsel in Case Nos. 3:22-cv-02583-RFL and 3:22-cv-02576-RFL have concurred in the filing of this document.

/s/ Timothy S. Bishop
Timothy S. Bishop